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No. 20

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

UNITED FEDERAL WORKERS OF AMERICA (C.I.O.), ET AL.,

Appellants,

v.

HARRY B. MITCHELL, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEES

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 34

UNITED FEDERAL WORKERS OF AMERICA (C.I.O.), ET AL.,

Appellants,

v.

HARRY B. MITCHELL, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEES

Opinion Below

The opinion of the District Court of the United States for the District of Columbia (R. 116-126) is reported at 56 F. Supp. 621.

Jurisdiction

A. PROCEEDINGS BELOW

This action was commenced in the District Court by the appellants (1) to enjoin the appellees from enforcing the

provision of Section 9(a) of the Act of August 2, 1939, 18 U. S. C. 61h (a), which forbids officers and employees in the executive branch of the Federal Government to take an active part in political management or political campaigns, and (2) for a declaratory judgment that this provision is unconstitutional (R. 1-9). A three-judge court[1] was duly convened pursuant to Section 3 of the Act of August 24, 1937, 28 U. S. C. 380a (R. 9-10). In an opinion filed on August 4, 1944 (R. 116-126) the three-judge court held the challenged provision valid, and on September 26, 1944, the court entered its judgment in accordance with that opinion, dismissing the complaint and granting summary judgment to the appellees (R. 126-127).

B. APPEAL PROCEEDINGS

On September 2, 1944, before the judgment below was rendered, appellants petitioned for appeal from the "order" of August 4, 1944, and an order allowing this appeal was entered by F. Dickinson Letts, Associate Justice of the District Court. Thereafter, on October 25 and November 20, 1944, Justice Letts entered orders extending the time within which the appeal could be perfected to and including November 25 and December 25, 1944, respectively (R. 130-131).

On October 26, 1944, appellants petitioned for appeal from the judgment of September 26, 1944 (R. 127-128) and an order allowing this appeal was entered by Chief Justice Groner (R. 130). On December 16, 1944, Chief Justice Groner signed a citation, returnable within 40 days from its date, and, on December 21, 1944, an order extending the

[1] Consisting of D. Lawrence Groner, Chief Justice of the United States Court of Appeals for the District of Columbia, and Jennings Bailey and James W. Morris, Associate Justices of the United States District Court for the District of Columbia.

time for docketing the record in this appeal to and including January 15, 1945 (R. 133).

No other orders were entered further extending the time within which to docket the case. On February 2, 1945, the appellants filed the record and docketed the case in this Court.

C. JURISDICTION OF THIS COURT

The jurisdiction of this Court is asserted under Section 3 of the Act of August 24, 1937, 28 U. S. C. 380a, which provides:

> • • • An appeal may be taken directly to the Supreme Court of the United States upon application therefor or notice thereof within thirty days after the entry of the order, decree, or judgment • • •. In the event that an appeal is taken under this section, the record shall be made up and the case docketed in the Supreme Court of the United States within sixty days from the time such appeal is allowed, under such rules as may be prescribed by the proper courts. • • •

The record in this case was not "made up and the case docketed" in this Court within the time specified by the statute. In view of this fact, the appellees, on February 26, 1945, filed with this Court a memorandum suggesting want of jurisdiction or delay requiring dismissal and, on March 9, 1945, the appellants filed an answer thereto. On March 12, 1945, the Court entered its order postponing further consideration of the question of jurisdiction to the hearing of the case on the merits (R. 135).

It is respectfully submitted that, for the reasons asserted in the memorandum filed with this Court by appellees on February 26, 1945, suggesting want of jurisdiction or delay requiring dismissal, the untimely filing of the record and docketing of the case in this Court requires the dismissal of

the appeal for want of jurisdiction.[2] Since that memorandum dealt fully with the subject, further discussion will not be included in this brief.

Questions Presented

1. Whether this Court has jurisdiction of a case appealed under Section 3 of the Act of August 24, 1937, 28 U. S. C. 380a, but not docketed within the time specified in that statute.[3]

2. Whether appellants, or any of them, have stated a claim which entitles them to relief against appellees.

3. Whether the provision of Section 9 (a) of the Act of August 2, 1939, 18 U. S. C. 61h(a), which forbids officers and employees "in the executive branch of the Federal Government" to take "active part in political management or in political campaigns", is constitutional.

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[2] In appellants' answer to appellees' memorandum, appellants contended that "failure to docket in time may be the occasion for the appellee having the cause docketed and the appeal dismissed" and that the appellees' failure to follow this procedure left them remediless (pp. 10-11). Appellants stated further: "We believe that if our reasons for delay were relevant, they would be found adequate. In any event, we would have been glad to advise the government of the details had it earlier expressed an interest in the matter" (p. 12). No such details were, however, advanced at a conference held on January 31, 1945, between counsel for appellants and counsel for appellees, held at the request of counsel for appellants. The subject of discussion was whether appellants' delay in docketing the case was fatal to the jurisdiction of this Court. The Solicitor General advised appellants' counsel that the appellees were prepared to docket the case and move to dismiss. Counsel for appellants stated that in his opinion appellants' failure to docket on time had resulted in a jurisdictional defect and that a preferable way of disposing of the matter might be for appellants themselves to move to dismiss the appeal and thereafter to institute a new suit. Counsel for appellees replied that they would withhold docketing the case and moving to dismiss the appeal, pending decision by appellants as to whether they themselves desired to move to dismiss. On February 2, 1945, without further notice, the appellants docketed the case in this Court.

[3] This question is treated under the preceding heading of *Jurisdiction*.

Statutes and Regulations Involved

The relevant provisions of the statutes and regulations involved are set forth in the Appendix, *infra*, pp. 51-59.

Statement

On April 25, 1944, appellants filed a complaint (R. 1-9) in the District Court of the United States for the District of Columbia, seeking (1) to enjoin appellees, the members of the United States Civil Service Commission (R. 3), "from enforcing the provisions of the second sentence of Section 9 (a) of the Hatch Act" (Act of August 2, 1939, as amended, 18 U. S. C. 61h(a)) and (2) "a declaratory judgment that it is repugnant to the Constitution of the United States" (R. 9).

The material allegations of the complaint may be summarized as follows: Appellants are the United Federal Workers of America, an unincorporated labor union composed of employees of the United States Government (R. 2), and twelve individuals, each of whom occupies a classified civil service position in the Federal Government (R. 2-3). The Union is organized for "the improvement of working conditions" of Federal employees (R. 3) and "must engage in legislative activity" to achieve its objectives (R. 4). It "has an interest in protecting and restoring the rights of its membership" and brought this action "as a representative of, and on behalf of, all of its members, including those who have not specifically joined in suing individually, who are subject to the provisions of the second sentence of Section 9 (a) of the Hatch Act" (R. 4). The individual appellants

> • • • desire to engage in the following acts: write for publication letters and articles in support of candidates for office; be connected editorially with publications which are identified with the legislative

> program of UFWA and candidates who support it; solicit votes, aid in getting out voters, act as accredited checker, watcher, or challenger; transport voters to and from the polls without compensation therefor; participate in and help in organizing political parades; initiate petitions, and canvass for the signatures of others on such petitions; serve as party ward committeeman or other party official; and perform any and all acts not prohibited by any provision of law other than the second sentence of Section 9 (a) and Section 15 of the Hatch Act, which constitute taking an active part in political management and political campaigns. (R. 4.)

One of the individual appellants, George Poole, has performed many of such acts in the past and intends to continue to do so (R. 4).

The complaint, as amended (R. 115), charged that the appellees had threatened to cause the individual appellants to be dismissed from Federal employment if they engaged in the activities referred to above and "have already commenced proceedings" for Poole's dismissal from the Government (R. 7); that the second sentence of Section 9 (a) of the Hatch Act is repugnant to the First, Fifth, Ninth, and Tenth Amendments to the Constitution of the United States (R. 7-8); and that unless appellees are permanently enjoined from enforcing it appellants will be unable to engage in the activities specified above "except by incurring the penalty of removal from employment" (R. 8), for which no adequate remedy is available at law (R. 7).

Appellants also filed a motion for interlocutory injunction (R. 10-11), attached to which were the affidavits of the individual appellants (R. 11-29). The affiants stated that they are citizens of the United States and Federal employees in the classified civil service and that it was the "earnest desire" of each of the individual appellants

> to engage actively in political management and political campaigns . . . by all proper means such as

> engaging in discussion, by speeches to conventions, rallies and other assemblages by publicizing my views in letters and articles for publication in newspapers and other periodicals, by aiding in the campaign of candidates for political office by posting banners and posters in public places, by distributing leaflets, by 'ringing doorbells', by addressing campaign literature, and by doing any and all acts of like character reasonably designed to assist in the election of candidates I favor. (R. 12, 15, 16, 18-29.)

These affidavits did not allege that 11 of the individual appellants had actually ever performed any of the described acts, but the affidavit of appellant Poole stated that

> • • • I have taken an active part in political campaigns and political management. In the 28th Ward, 7th Division in the City of Philadelphia I am and have been a Ward Executive Committeeman. In that position I have on many occasions taken an active part in political management and political campaigns. I have visited the residents of my Ward and solicited them to support my party and its candidates; I have acted as a watcher at the polls; I have contributed money to help pay its expenses; I have circulated campaign literature, placed banners and posters in public places, distributed leaflets, assisted in organizing political rallies and assemblies, and have done any and all acts which were asked of me in my capacity as a Ward Executive Committeeman. I have engaged in these activities both before and after my employment in the United States Mint. I intend to continue to engage in these activities on my own time as a private citizen, openly, freely, and without concealment. (R. 13.)

Poole's affidavit further stated that he had "been served with a proposed order of the United States Civil Service Commission" advising him that he had been found "'guilty of political activity in violation of Section I, Civil Service

Rule I' " and that unless he could refute such charges he would be dismissed from his position in the United States Mint at Philadelphia (R. 13-14).

Appellees then filed motions to dismiss the complaint and for summary judgment in their favor on the grounds that the complaint stated no claim or controversy against appellees upon which relief could be granted, that appellees were entitled to judgment as a matter of law, and that the court lacked jurisdiction to grant the relief requested (R. 29-30). In support of their motions, appellees filed affidavits by Lawson A. Moyer (R. 30-111), the Executive Director and Chief Examiner of the United States Civil Service Commission (R. 30), and of Kenneth C. Vipond (R. 111-113), the Acting Executive Director and Chief Examiner of the Commission (R. 111).

The affidavit of Mr. Moyer averred that "Except with respect to its own employees, the Civil Service Commission is not authorized to, and does not, enforce the provisions of Section 9 (a) of the Hatch Act. The Civil Service Commission does enforce the provisions of Civil Service Rule I by the method set forth in Rule XV of the Rules of the Civil Service Commission as to Federal employees in the competitive classified service" (R. 30).[4] Mr. Moyer further stated that no proceedings of any kind have been instituted by the Commission and no disciplinary action of any kind has been taken against any of the appellants except Poole (R. 31). As for Poole, the Commission and the Treasury Department had jointly conducted an investigation of "alleged political activities" on his part, and as a result a Proposed Order was issued by the Commission on January 12, 1944 (R. 31, 33-35), charging that he took an active part in political management and campaigns "in contravention of Section 1, Civil Service Rule I, and the regula-

[4] See fn. 5, *infra*.

tions adopted by the Commissioners thereunder", by (1) holding the office of Democratic Ward Executive Committeeman in Philadelphia, Pennsylvania; (2) acting as a Democratic Party worker at the polls on general election day, November 5, 1940; and (3) assisting in the "distribution of funds in paying party workers" for services on that day (R. 33-35). The Proposed Order, setting forth the charges (R. 33), the substantiating evidence (R. 33-34), and the preliminary finding of the Commission (R. 35), and further setting forth Poole's right to answer and to present any evidence in refutation of the charges (R. 35), had been sent to Poole by registered mail (R. 31-32). Counsel for Poole had sought and obtained from the Commission an indefinite extension of time within which to answer the Proposed Order; but neither an answer nor a request for a hearing had been filed and no final order had been issued with respect to Poole (R. 32).

The affidavit of Mr. Vipond reiterated that the "Commission does not have the statutory authority to enforce, and does not enforce, Section 9 (a) of the Hatch Act with respect to any Federal employees except those who are" employed by it (R. 111-112); and that Commission Form 1982 (annexed to the amended complaint as Exhibit II, R. 114A-115) "is addressed to Federal employees for their advice and guidance" (R. 112).

The court below, a three-judge statutory court duly convened by the Chief Justice of the United States Court of Appeals for the District of Columbia pursuant to Section 3 of the Act of August 24, 1937, 28 U. S. C. 380a (R. 9-10), after hearing, granted the appellees' motions, dismissing the complaint and granting summary judgment for appellees (R. 127). Ruling that the individual appellants "have such an interest as to give them the right to maintain this suit" (R. 120) and that the suit was properly brought against the

appellees (R. 123), the court upheld the constitutionality of the second sentence of Section 9 (a) of the Hatch Act (R. 126).

Summary of Argument

Although, as we contend in this brief, the court below correctly decided that the second sentence of Section 9(a) of the Hatch Act, here challenged, is constitutional, we respectfully submit that the suit should have been dismissed for lack of jurisdiction.

Even without reference to possible technical deficiencies in appellants' complaint, and conceding *arguendo* that the interest of at least the appellant Poole was sufficiently threatened to warrant equitable intervention if the matter were of equitable cognizance, appellants have mistaken their remedy and their forum. The individual appellants assert their right to continue in their positions notwithstanding political participation on their part and seek an injunction to protect their tenure as against possible acts lying within the official province of appellees. They may not succeed; for "it is * * * well settled that a court of equity has no jurisdiction over the appointment and removal of public officers * * *." *White* v. *Berry*, 171 U. S. 366, 377.

Even the remedy of mandamus may not be used to interfere with the performance of the duties of executive officers of the Government in relation to personnel matters. This is precisely what appellants seek in this case to accomplish by injunction. Their remedy, we submit, is not to attempt thus to forestall the administrative process, but to exercise their legal rights and, if disciplinary action is taken, to sue for any compensation wrongfully withheld from them.

The same considerations which place it beyond the jurisdiction of the courts to grant preventive relief to appellants, cause the prayer for a declaratory judgment to fail; for "The declaratory * * * judgment procedure may be resorted to only in the sound discretion of hte Court * * *". *Alabama State Federation of Labor* v. *McAdory*, No. 588, October Term, 1944, p. 8 of slip opinion.

The challenged provision of the Hatch Act is not a strange or novel development in the law governing the Federal civil service, but has a background extending back to the early years of the Republic. Political activity by Government officers and employees has been a cause of complaint from the beginning. In its efforts to deal with the problem thus recognized and with attendant evils, Congress has validly adopted the provision which is here under attack and has enacted related measures. These must be considered together in determining the question presented.

The provision was not lightly adopted and represents the considered judgment of the Congress. It is less drastic than the Civil Service Rule which preceded its enactment and is closely related to statutory prohibitions of political assessments against government employees and against partisan discrimination in promotion and discharge. The line between permissible and forbidden conduct has been a shifting one and cannot remain fixed; the problem is properly subject to legislative discretion.

In general, the provision in question has the following purposes: (1) to eliminate one basis for politically motivated removals and discrimination among employees; (2) to forestall the use of public employees and the abuse of official authority for partisan purposes; (3) to aid in providing an efficient administrative service; and (4) to establish confidence in the fairness of the public service.

Similar restrictions upon the political activity of public officers and employees are a characteristic feature of pres-

ent-day government in the English-speaking world. Five states of the union have enactments of similar scope which may stand or fall with the challenged provision. The tradition of abstention from partisan political activity which these enactments evidence grows out of the needs of modern government, and the effort to eliminate the grosser evils of discrimination and patronage. These considerations are of increasing importance and do not lead in the Hatch Act to the imposition of a condition of weak neutrality upon Federal officers and employees, who may publicly and privately express their personal views and may in their official relations state their convictions frankly. A single channel of political expression and activity is alone denied them so long as they remain in the Federal employ.

The restriction which Congress has thus imposed is not violative of either the First or the Fifth Amendment. The question is first of all one of the reasonableness of the provision in order to check a substantive evil which Congress has a right to prevent. To hold that the provision is violative of the First Amendment would be improperly to substitute the judicial judgment for that of Congress. Nor is it valid to contend that Congress has gone beyond its power by striking at the root of the problem with which this and related legislation deals, instead of confining itself to prohibiting specific pernicious practices. Congress may elect to deal with the sources of evils which are properly of concern to it, even to the extent of controlling activity which would otherwise be beyond its power to reach.

The distinctions among Government employees which the challenged provision establishes rest upon a sound foundation and do not constitute a ground of invalidity. The contention that the inclusion of mechanical, clerical, and custodial employees renders the prohibition invalid, breaks down upon analysis.

The legislation here in question is entitled to the presumption of constitutionality, which should not be lightly disregarded in a matter of such importance.

ARGUMENT

I

The Court Below Lacked Jurisdiction to Grant the Relief Requested

While the court below upheld the constitutionality of the second sentence of Section 9(a) of the Hatch Act, a holding which we believe was correct and which we support in this brief, we respectfully submit that the court should have dismissed the suit for lack of jurisdiction, without passing upon the constitutional question. This is true as to both the injunctive relief and the declaratory judgment which were sought.

A. NO EQUITABLE CAUSE OF ACTION IS STATED

Even without reference to possible technical deficiencies in appellants' complaint,[5] their suit relates to a subject

[5] Appellants' complaint seeks an injunction against the appellees as members of the United States Civil Service Commission, enjoining them "from enforcing the provisions of the second sentence of Section 9(a) of the Hatch Act." The Commission's proceedings against appellant Poole, however, were not commenced for violation of Section 9(a) of the Hatch Act, but for violation of Section 1 of Civil Service Rule I (R. 13, 33, 35) which provides in part that persons "in the competitive classified service, while retaining the right to vote as they please and to express their opinion on all political subjects, shall take no active part in political management or in political campaigns" (R. 39; 5 C. F. R., 1943 Cum. Supp., § 1.1). The Commission does not claim authority to enforce Section 9(a) of the Hatch Act as to any Federal employees other than members of its own organization (*supra*, pp. 8, 9). Appellants, therefore, are not threatened with any action by the appellees under that section.

With respect to classified employees, the proscription contained in Section 1 of Civil Service Rule I (*infra*, p. 58) is, however, almost identical with that contained in the second sentence of Section 9(a) of the Hatch Act. Civil Service Rule XV (*infra*, p. 59) provides that the Commission, upon finding "after due notice and opportunity for explanation

matter with respect to which the courts do not have jurisdiction to grant injunctive relief. Conceding *arguendo* that the immediacy of the threat by appellees to the interest of at least the individual appellant Poole as a government employee might be sufficient to warrant equitable intervention if the matter were of equitable cognizance,[6] appellants have mistaken their remedy and their forum.

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that any employee subject" to the Civil Service Act or Rules has violated any of them, "shall certify the facts to the proper appointing officer with specific instructions as to discipline or dismissal of the person or employee affected. If the appointing officer fails to carry out the instructions of the Commission within 10 days after receipt thereof, the Commission shall certify the facts to the proper disbursing and auditing officers, and such officers shall make no payment or allowance of the salary or wages of any such person or employee thereafter accruing" (5 C. F. R. 1943 Cum. Supp., § 15.1; see R. 30-35, 41-44). The statutory penalty of dismissal is now mandatory for violation of the pertinent provision of Rule I, as for violation of the statutory provision, R. 41; 40 Op. Atty. Gen. No. 2.

For these reasons it may be conceded that as to classified employees the Civil Service Commission does in practical effect enforce the challenged provision of § 9(a) as well as the corresponding provision of Civil Service Rule I, as the court below found (R. 122-123), or at least that it is immaterial which enactment is referred to in a complaint such as appellants'. Since the action of dismissing offending employees must in any event be taken by the heads of the employing departments (39 Op. Atty. Gen. at 447, 462), it may be questioned whether complete relief could be afforded to appellants in this proceeding if they should prevail; but the defect of parties, if there be one, is scarcely jurisdictional.

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[6] Appellant Poole, who admits having engaged in conduct which is proscribed by § 9(a) of the Hatch Act as elaborated in the determinations of the Civil Service Commission invoked by § 15, appears to be threatened by enforcement proceedings which can have but one outcome. Legal rights asserted by him are, therefore, "threatened with imminent invasion by appellees", as in *Railway Mail Association* v. *Corsi*, No. 691, October Term, 1944, and in the cases cited at p. 4 of the slip opinion. As to the other individual appellants it is at best doubtful whether the asserted definiteness of their "desire" to engage in specified political activities which would be in violation of the challenged provision (R. 4, 12, 15-16, 18-29) can be a substitute for actual threatened application of the broad provision of the statute to them (*Alabama State Federation of Labor* v. *McAdory*, No. 588, October Term, 1944, p. 8 of slip opinion; *Watson* v. *Buck*, 313 U. S. 387, 402) as a foundation for seeking equitable relief. The appellant United Federal Workers, which makes no claim on its own behalf but joins in the action simply "as a representative of, and on behalf of, all of its members" (R. 4),

The individual appellants seek to enjoin interference with their right to retain their positions in the Federal Government while carrying on activities which are in violation of the restrictions imposed by the second sentence of Section 9(a) of the Hatch Act and by Civil Service Rule I, upon the ground that these restrictions are invalid. In other words, they assert the right to continue in their positions as against possible acts lying within the official province of appellees which might bring about appellants' removal.[7] This may not be done in an injunction proceeding, and it is doubtful at best whether any other type of preventive remedy is available for the same purpose.

In the words of this Court in the leading case of *White* v. *Berry*, 171 U. S. 366, 377, quoting from *In re Sawyer*, 124 U. S. 200, 212, "it is * * * well settled that a court of equity has no jurisdiction over the appointment and removal of public officers * * *." The Court therefore held that a district court is powerless to enjoin a dismissal of a Federal employee in the classified civil service in alleged violation of the Civil Service Act.[8]

Even the remedy of mandamus, which under some cir-

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can have no greater standing to sue than the individuals for whom it speaks. Those who are not parties to the action have not even expressed a "desire" to become active politically and still keep their jobs. The Union, we submit, has not stated a cause of action which it is entitled to bring to court—even if a union may sue as a representative of members who are aggrieved. Cf. *Hague* v. *C. I. O.*, 307 U. S. 496, 514, 527; *United States* v. *White*, 322 U. S. 694.

[7] They also, of course, assert the right to engage in certain political activities, but it is not alleged that appellees are threatening to interfere with this right except as they would do so indirectly by proceedings looking to the individual appellants' dismissal from their positions. These appellants' status as Federal employees is the *sine qua non* of the alleged cause of action.

[8] So unquestioned has been the rule thus established that subsequent Federal decisions in point appear to be lacking, but the rule has been often repeated. See, e. g., *Walton* v. *House of Representatives*, 265 U. S. 487, 490; *People* v. *Finnegan*, 378 Ill. 387, 394-401 (1941); *Welker* v. *Lathrop*, 210 N. Y. 434 (1914).

cumstances may be invoked to correct a procedurally improper dismissal of a Government employee, *Borak* v. *Biddle*, 141 F. 2d 278 (App. D. C.), or to enforce the clear statutory right of such an employee, *Farley* v. *United States*, 92 F. 2d 533 (App. D. C.), may not be used to interfere with the performance of the duties of executive officers of the Government in relation to personnel matters. *Levine* v. *Farley*, 107 F. 2d 186 (App. D. C.); *United States* v. *Mitchell*, 89 F. 2d 805 (App. D. C.). That, however, is precisely what appellants seek in this case to accomplish by injunction. Appellees have the duty of instituting proceedings in proper cases to determine whether employees in the classified civil service have engaged in illegal political activity and, if such activity is found to have occurred, to take steps to bring about the dismissal of those who have offended. This is a delicate function not lightly bestowed upon the appellees or lightly to be exercised, relating to the internal operations of the Government, the performance of which the courts should not undertake to prevent even on constitutional grounds. The remedy of the individual appellants, we submit, is not to attempt to forestall the administrative process by injunction but to exercise what they deem to be their legal rights (as nothing prevents their doing and as appellant Poole has done) and, if disciplinary action is taken leading to loss of their positions and of compensation due them, to sue for any sums wrongly withheld. See *United States* v. *Perkins*, 116 U. S. 483; *Myers* v. *United States*, 272 U. S. 52; *Humphrey's Executor* v. *United States*, 295 U. S. 602; *Lovett et al.* v. *United States*, C. Cls. cases Nos. 46026, 46027, and 46028, decided November 5, 1945.

The unwisdom of interference by injunction at this stage of appellants' case is emphasized by their concession (Br. 13) that, were it not for the specificity given to the challenged provision of Section 9(a) of the Hatch Act by Section 15 (*infra*, pp. 53-54) which incorporates into Section

9(a) the relevant substance of the Civil Service Commission's interpretation of its Rules as they existed in 1940, the "extremely general language" of the provision "could readily have been so construed and applied as not to result in conflict with the First Amendment." If only specific aspects of the prohibition of Section 9(a) are alleged to offend against the Constitution, ground is lacking for the sweeping injunction which is sought. Appellants cannot rightly seek to paralyze the entire enforcement of a broad statutory provision in order to prevent specific applications which alone are alleged to be unconstitutional. *Alabama State Federation of Labor* v. *McAdory; Watson* v. *Buck*, both *supra*, n. 6.

B. NO CASE FOR A DECLARATORY JUDGMENT IS PRESENTED

The same considerations which, as we contend, place it beyond the jurisdiction of courts to grant preventive relief to the appellants, cause the prayer for a declaratory judgment to fail; for "The declaratory judgment procedure may be resorted to only in the sound discretion of the Court and where the interests of justice will be advanced and an adequate and effective judgment may be rendered." *Alabama State Federation of Labor* v. *McAdory*, *supra*, p. 8 of slip opinion. If considerations bearing upon the proper relation of the judiciary to the administration of governmental personnel matters impose a self-denying ordinance upon the courts pending the performance of executive functions in relation to these matters (*supra*, pp. 15-17), the ordinance applies no less to declaratory judgment proceedings than to others in which it is sought to anticipate actual injury to the moving parties. In addition, this Court has emphasized the undesirability of permitting such proceedings to be made a medium for securing advisory opinions "in a controversy which has not arisen" (*Coffman* v. *Breeze Corporations*, 323 U. S. 316, 324, and authorities

there cited), as would be the case here with respect to other appellants than Poole.

II

The Provision of the Hatch Act Questioned Herein Is Constitutional

The Hatch Act, approved on August 2, 1939, was intended to strengthen the public service and eliminate certain evils in the use of official personnel. Section 9(a) of the Act relates solely to conduct of officers and employees of the Federal Government. The first sentence of Section 9(a) prohibits the use of "official authority or influence for the purpose of interfering with an election or affecting the result thereof." The third sentence provides that employees "shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates." Appellants do not question the constitutionality of these provisions. They attack the validity of only the second sentence, which forbids Federal employees, with certain exceptions not here material, to take "active part in political management or in political campaigns." We shall show that this sentence, as well as the other two, is a proper exercise of the congressional power to establish a sound, impartial civil service based upon merit and divorced from "spoils," as well as freed from subtle pressures and influence to which political considerations in administration may give rise.

A. The provision of section 9(a) which is here attacked is a consistent development in federal legislation affecting the civil service.

The provision of the Hatch Act which is here under attack is not a strange or novel development in the law governing the Federal civil service. As the history of this

country makes abundantly clear, "From the beginning of our government there has been complaint of the activity of office-holders; and such complaint will probably never cease, as it is practically impossible to draw a working distinction between the proper interest of the citizen and the obligations of the servant of the government."[9] In its efforts to deal with the problem thus recognized and with attendant evils, Congress has adopted significant measures other than the present one and has sanctioned additional measures which have been placed in effect by executive order.

In a message accompanying his approval of the Hatch Act, which dealt specifically with the rights of Federal employees under the provision now questioned, President Roosevelt noted that "in applying to all employees of the Federal Government (with a few exceptions) the rules to which the civil-service employees have been subject for many years, this measure is in harmony with the policy that I have consistently advocated during all my public life, namely, the wider extension of civil service as opposed to its curtailment."[10] The consistency of the challenged provision with the development of the civil service in this country was thus recognized.

The provision, moreover, was not adopted lightly or without recognition of its background or of the constitutional issues that might be raised with regard to it. Orig-

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[9] Carl Russell Fish, *The Civil Service and the Patronage* (1904), p. 179. This study is the standard work which deals with the background of the Civil Service Act of 1883. Earlier pages contain much evidence that the political activity of prior office-holders, not less than the desire of political victors for spoils, played a large part in the removals of public servants from office which gave rise to such widespread criticism and, in the end, received legislative treatment. The Fifteenth Annual Report of the United States Civil Service Commission (1898) also reviews the history lying back of the Act, at pp. 443-485.

[10] S. Doc. 105, 76th Cong., 1st sess., p. 1.

inally enacted by the Senate in more drastic form,[11] the bill was revised in the House after thorough debate [12] which centered mainly upon the provision in question and related proposals which came before the two houses. The resulting product was accepted in the Senate after its Senatorial sponsor had characterized it as expressing "the philosophy of the Senate of the United States as contained in section 9." [13] In the House the relationship of the bill to the civil service laws and its application to various categories of Federal employees were thoroughly explored and understood. In 1940, when important additions to the Act were proposed and adopted at a later session of the same Congress, extensive debate occurred in the Senate [14] as well as the House.[15] In the Senate a proposal to repeal Section 9 was discussed and rejected.[16] Clearly, therefore, the provision in question represents the considered judgment of both houses with respect to the restraints which should be placed upon the political activity of government officers and employees, as the court below found (R. 124).

The concern of Presidents with protecting the integrity of the civil service as against the consequences of political activity by office-holders has been evidenced throughout our history. In 1801 the heads of the executive departments, at the direction of President Jefferson, issued an order, stating that

> The President of the United States has seen with dissatisfaction officers of the General Government taking on various occasions active parts in elections of the public functionaries, whether of the General or of the State Governments * * * it is deemed im-

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[11] The bill as passed by the Senate is printed at 84 Cong. Rec. 9596.
[12] 84 Cong. Rec. 9594-9640.
[13] 84 Cong. Rec. 9672.
[14] 86 Cong. Rec. 2338-2367, 2426-2442, 2696-2723, 2920-2963, 2969-2987.
[15] *Id.*, 9360-9380, 9426-9432, 9434-9463.
[16] *Id.*, 2357-2367, 2431-2440.

proper for officers depending on the Executive of the Union to attempt to control or influence the free exercise of the elective right. This I am instructed, therefore, to notify to all officers within my Department holding their appointments under the authority of the President directly, and to desire them to notify to all subordinate to them. The right of any officer to give his vote at elections as a qualified citizen is not meant to be restrained, nor, however given, shall it have any effect to his prejudice; but it is expected that he will not attempt to influence the votes of others nor take any part in the business of electioneering, that being deemed inconsistent with the spirit of the Constitution and his duties to it. [10 Richardson, *Messages and Papers of the Presidents*, 98-99; Congressional Globe, 25th Cong., 3rd Sess., Vol. 7, Appendix, p. 405; 86 Cong. Rec. 2433-2434.]

Forty years later, Secretary of State Daniel Webster issued the following order to department heads at the direction of President William Henry Harrison:

SIR:

The President is of opinion that it is a great abuse to bring the patronage of the General Government into conflict with the freedom of elections, and that this abuse ought to be corrected wherever it may have been permitted to exist, and to be prevented for the future.

He therefore directs that information be given to all officers and agents in your department of the public service that partisan interference in popular elections, whether of State officers or officers of this Government, and for whomsoever or against whomsoever it may be exercised, or the payment of any contribution or assessment on salaries, or official compensation for party or election purposes, will be regarded by him as cause of removal.

It is not intended that any officer shall be restrained in the free and proper expression and maintenance of

> his opinions respecting public men or public measures, or in the exercise to the fullest degree of the constitutional right of suffrage. But persons employed under the Government and paid for their services out of the public Treasury are not expected to take an active or officious part in attempts to influence the minds or votes of others, such conduct being deemed inconsistent with the spirit of the Constitution and the duties of public agents acting under it; * * * [4 Richardson, *Messages and Papers of the Presidents*, 52.]

Again, on June 22, 1877, President Rutherford B. Hayes promulgated the following rule "applicable to every department of the civil service":

> No officer should be required or permitted to take part in the management of political organizations, caucuses, conventions, or election campaigns. Their right to vote and to express their views on public questions, either orally or through the press, is not denied, provided it does not interfere with the discharge of their official duties. No assessment for political purposes on officers or subordinates should be allowed. [7 Richardson, *Messages and Papers of the Presidents*, 450-451.]

The Civil Service Act of January 16, 1883, in addition to prohibiting specific conduct relating to political contributions by government employees,[17] empowered the President to promulgate "rules for carrying this act into effect," which should provide, *inter alia*, "that no person in the public service is for that reason under any obligations to contribute to any political fund, or to render any political service, and that he will not be removed or otherwise prejudiced for refusing to do so," and "that no person in said service has any right to use his official authority or influence to coerce the political action of any person or body" (§ 2, 22 Stat. 403-404, 5 U. S. C. 633).

[17] 22 Stat. 403, §§ 11-14.

Pursuant to this authority and that contained in R. S. § 1753, 5 U. S. C. 631,[18] President Arthur, on May 7, 1883, promulgated the original Civil Service Rules, which in respect to political activity were couched in the language of the statute.[19] Civil Service Rule I was revised by President Theodore Roosevelt on June 3, 1907, to provide as follows:

> No person in the Executive civil service shall use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. Persons who, by the provisions of these rules are in the competitive classified service, while retaining the right to vote as they please and to express privately their opinions on all political subjects, shall take no active part in political management or in political campaigns. [Twenty-fourth Annual Report of the Civil Service Commission, p. 104.]

This provision was more drastic as respects employees in the competitive classified service than the second sentence of § 9(a) of the Hatch Act, to which the Civil Service Rule has now been made to conform (R. 41), in that it limited the expression of opinion on political subjects to such as might occur "privately" whereas the Act and the present Rule permit such expression without this limitation. Cf. the message of President Franklin D. Roosevelt, *supra*, n. 10; 40 Op. Atty. Gen. No. 2.

It is clear that the present statutory regulation of political activity on the part of officers and employees of the executive branch of the Government grows out of long experience and concern with the problem involved. By execu-

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[18] "The President is authorized to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof, * * * and for this purpose he may * * * establish regulations for the conduct of persons who may receive appointments in the civil service." *Infra*, p. 56.

[19] 8 Richardson, *Messages and Papers of the Presidents*, 161; 18th Annual Report of the Civil Service Commission, p. 163.

tive warning, statutory provision, and executive order, controls have long been attempted. The line between permissible and forbidden conduct has been a shifting one. It cannot remain fixed as changing political methods come into vogue and government develops in size and in the nature of its activities. The problem is properly one of legislative concern and, within broad limits of constitutionality, must remain subject to legislative discretion. Whatever may be the faults attributable to the present rule, it is close to the line of historical development and does not transcend the power of Congress under a Constitution which is above all a practical charter of government.

Political management and participation in political campaigns are obviously not evil in themselves and are forbidden to officers and employees, other than those who are excepted from the prohibition, because of a danger of undesirable consequences which is deemed to be inseparable from such activities. The nature of these consequences is indicated partially by other provisions of the Hatch Act and the Civil Service Act and Rules and partially by the recognition which has been given in discussion and literature to certain relevant aspects of modern government. In general, the prohibition has the following purposes: (1) to eliminate one basis for politically-motivated removals from office and discrimination among employees; (2) to forestall the use of public employees and the abuse of official authority for partisan purposes; (3) to aid in providing for the legislature and the responsible heads of government an efficient administrative instrument for effectuating the policies which they determine upon; and (4) to establish confidence in the fairness of the public service, not only as between political parties themselves but also as between competing economic and social groups which

may work through parties or through the leaders and adherents of parties.

The appellants do not challenge the validity of other statutory provisions which are directed to one or another of these same ends, even though some of those provisions also limit the freedom of activity and of speech which government employees may enjoy as compared with other citizens. Provisions of the Criminal Code derived from the original Civil Service Act forbid government officers and employees (1) to solicit or receive political contributions or assessments from other such officers or employees (35 Stat. 1110, 18 U. S. C. 208, *infra*, p. 55; see *United States* v. *Wurzbach*, 280 U. S. 396); and (2) to make political contributions to other government employees or to members of Congress (35 Stat. 1110, 18 U. S. C. 211, *infra*, p. 56).[20] In addition, the Hatch Act, the Criminal Code, and the Civil Service Act and Rules forbid (1) the use of official authority to influence or interfere with elections or to coerce the political action of others (§ 2 of the Hatch Act, 18 U. S. C. 61a; § 2 of the Civil Service Act of 1883, 5 U. S. C. 633, *infra*, p. 57; Civil Service Rule I, *infra*, p. 58); (2) the discharge, promotion, or demotion of any officer or employee for giving or withholding any political contribution (35 Stat. 1110, 18 U. S. C. 210, *infra*, p. 58); and (3) the solicitation or consideration of information as to political opinion or of political recommendations in passing upon any application for admission to a civil service examination or making an appointment or promotion to a position in the competitive civil service (Civil Service Rule I, *infra*, pp. 58-59).

The Hatch Act provision here challenged may not be

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[20] These provisions are derived from §§ 11 and 14 of the Civil Service Act, 22 Stat. 403, 406-407. See the Act of March 4, 1909, 35 Stat. 1088, 1153, 1156. Section 12 of the Act, as carried forward (35 Stat. 1110, 18 U. S. C. 209, *United States* v. *Thayer*, 209 U. S. 39, *United States* v. *Newton*, 9 Mackey 226 (D. C.)) forbids the solicitation or receipt of political contributions in government offices.

considered apart from the context in which it appears, which includes the foregoing prohibitions; for partisan political activity by government employees forms "a part of the game"[21] of party maneuvering which includes the specific evils at which these prohibitions are aimed. It is understandable that appellants should refrain from challenging those restrictive provisions of law which are obviously designed for their protection as government employees; but in doing so and at the same time insisting upon a constitutional right to engage in activities which would *invite these as well as other evils*, they occupy an inconsistent position. Congress was entitled to conclude, as the Executive had previously done, that specific restrictions upon enumerated harmful acts were inadequate to cope with the problem that was of concern to it and that partisan political activity amounting to participation in management and in campaigns, should be forbidden. In the words of one writer, the prohibition here questioned, which extended to the great bulk of non-civil service employees the prohibition long contained in Civil Service Rule I, was reasonably considered to be necessary in order to avoid the "grave danger of a gradual but certain return of that political influence which enforcement of this rule had undoubtedly done a great deal to suppress." Mayers, *The Federal Service*, 166.[22]

B. THE PROHIBITION GROWS OUT OF THE NEEDS OF MODERN GOVERNMENT

Restrictions upon the political activity of public officers and employees, other than those in politically responsible

[21] See the remarks of Congressman Ramspeck at 84 Cong. Rec. 9616, with regard to a proposed amendment to § 2 of the Hatch Act which would have affirmatively sanctioned such activity.

[22] "The step from the Civil Servant politician to the Politicalized Civil Service is but a short one." *Report of the Committee on Parliamentary, Etc., Candidature of Crown Servants* (Cmd. 2408, 1925), p. 28. See also the opinion of the court below at R. 124-125.

policy-making positions,[23] are a characteristic feature of present-day government in the English-speaking world.[24] It has been stated that—

> • • • civil service neutrality is a fundamental requirement of democratic government, if an outright spoils system is to be avoided. Everywhere the democratic State is thus faced with the necessity of preserving the impartiality of its permanent servants • • •
>
> Since impartiality is a necessary concomitant of a permanent civil service in the democratic State, this fact is necessarily reflected in the status of public employees • • • It has been necessary in every democratic State to define these additional limitations and to compromise the conflicts which arise from the dual status of civil servants: as citizens and as impartial servants of the whole community. The result has uniformly been a limitation upon the political rights of the public employee. [Mosher and Kingsley, *Public Personnel Administration*, 385-386.]

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[23] Policy-making positions in the sense here intended and in the sense which is common in discussions of civil service problems are illustrated by the enumeration in § 9(a) of the Hatch Act of positions excepted from the prohibitions of that section. It is of course true that many lesser positions involve duties which are in part concerned with the formulation of policy (cf. the *Report of the President's Committee on Civil Service Improvement*, 77th Cong., 1st sess., H. Doc. 118, p. 31). Such positions, however, involve advice or the formulation of policy in a preliminary way or "interstitially" within the limits of directions previously marked out, rather than decision upon the directions themselves or upon major governmental measures. The positions which are designated as policy-making for present purposes involve politically-responsible policy-making in the latter sense.

[24] Kaplan, *Political Neutrality of the Civil Service*, 1 Pub. Pers. Rev. 10, 18. Leonard D. White, *Civil Service in the Modern State* (1930) contains texts and basic documents which relate to the civil service systems of 14 countries of the world before World War II. On the continent of Europe civil servants were not formally limited in their political activity but were, of course, specially charged with fidelity to the state and to the public welfare. See generally, "Civil Service," 3 Encyc. of the Social Sciences (1930) 515-523.

In Great Britain such restrictions began before the establishment of the competitive civil service, through the enactment in 1742 of a statute which rendered officers employed in the Treasury, the Admiralty, and the offices of the Principal Secretaries of State ineligible for election to Parliament.[25] The present rule requires an officer of the civil service, other than political officers and industrial employees, to resign immediately upon becoming a candidate,[26] while departmental regulations impose varying degrees of restriction upon political activity other than candidature.[27] In Canada [28] and South Africa [29] the restrictions are substantially the same as those in § 9(a) of the Hatch Act, here challenged, as respects both Dominion and provincial elections. In Australia officers of the government are ineligible for election to the Parliament of the Commonwealth [30] and are forbidden to comment publicly upon the administration of any department of the Commonwealth.[31] As these enactments evidence, there exists in respect to civil service officers and employees in English-speaking countries a tradition of abstention from partisan political activity, backed by varying degrees of legal enforcement, which in Great Britain has been characterized as "an unwritten but none the less general rule that they must maintain a reserve in political matters and not put themselves forward prominently on one side or the other." [32]

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[25] 15 Geo. II c. 22. See *Report of the Committee on Parliamentary, Etc. Candidature of Crown Servants* (Cmd. 2408, 1925), p. 6; Finer, *The British Civil Service* (1937), p. 201.

[26] Order in Council of July 25, 1927, London Gazette, July 26, 1927, p. 4799, re-enacting the substance of clause 16 of the Order of Jan. 10, 1910, London Gazette, Jan. 11, 1910, p. 239.

[27] Op. cit. *supra*, n. 25, pp. 8-9.

[28] Civil Service Act of 1918, c. 12, § 32 (R. S., 1927, Civil Service, § 55).

[29] Public Service & Pension Act of 1923 (Act No. 27), § 20(1)(f).

[30] Constitution Act, 63 and 64 Vict. c. 12, § 44(iv).

[31] Public Service Regulations, § 34(a) (Commonwealth Statutory Rules, 1935, p. 463). See also the South African Act, *supra*, n. 29, § 20(1)(e).

[32] Op. cit. *supra*, n. 25, p. 8.

Among the States of the Union, out of 21 having general civil service laws, 5 have provisions of the same scope as Section 9(a) of the Hatch Act here involved.[33] A substantial body of state legislation, therefore, follows the same principle as the challenged provision and would fall as an infringement of the Fourteenth Amendment, embodying the principles of the First Amendment, if appellants were to prevail upon the broad ground which they have advanced.

The reasons for limiting the political activity of public employees which are now most often advanced in discussion, relate to the advantages of political neutrality in the civil service, rather than merely to prevention of the grosser evils of patronage and discrimination among employees on partisan grounds. As early as 1884 a British Treasury Minute expressed a "strong sense of the public injury which must be the consequence of any departure" from the "essential" condition that the members of the civil service "should remain free to serve the Government of the day, without necessarily exposing themselves to public charges of inconsistency or insincerity."[34] Thirty years later the Royal Commission on Civil Service reported[35] its view that it would "be disastrous if the feeling should arise that the

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[33] Ala. Code (1940), tit. 12, § 157; Conn. Gen. Stat. (Supp. 1939), c. 105a, § 698e; Ohio Gen. Code (Page, 1937), § 486-23; Pa. Stat. Ann. (Purdon, 1942), § 741.904; R. I. Acts & Resolves, 1939, p. 118. Such provisions have been upheld as constitutional in *McCrory* v. *City of Philadelphia*, 345 Pa. 154 (1942); *Duffy* v. *Cooke*, 239 Pa. 427, 441 (1913); and *Ricks* v. *Dept. of State Civil Service*, 200 La. 341 (1942).

[34] Op. cit. supra, n. 25, p. 7 (Cmd 2408)

[35] Cd. 7338 (1914), p. 97.

effectiveness of a legislative policy would be in any degree dependent upon the political bias of those administering it" and that, "if restrictions on the political activity of public servants were withdrawn", "the public might cease to believe in the impartiality of the permanent Civil Service" and Ministers might lose confidence in their subordinates and be influenced by the utterances and writings of staff members in making promotions to responsible positions. "Ministerial patronage" would return and the Civil Service would cease to be capable of loyal service to all parties alike. "The result would be destructive of • • • one of the most honorable traditions of our public life." [36]

In this country too the need of an impartial permanent civil service, chosen for proficiency and governe in respect to promotions by the principle of recognizing ability and performance, and the inconsistency of political activity by its members with the maintenance of such a service, have been recognized. The President's Committee on Civil Service Improvement, reporting in 1941, laid down the following as two of the special considerations which it kept in mind in framing its recommendations: [37]

> 3. Government officials and employees, except those occupying positions the duties of which are to determine policy, should be free from partisan obligations, either in securing initial appointment or in advancement from time to time; they should be under no obligation to maintain membership in any political party or to make contributions to party funds; and they should be fully protected against partisan influence in making decisions in particular cases or otherwise in the performance of their official work.

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[36] See also the *Report of the Board of Enquiry • • • to Investigate Certain Statements Affecting Civil Servants*, Cmd. 3037 (1928), pp. 21-22.

[37] 77th Cong., 1st sess., H. Doc. 118, p. 22.

4. All Government officials and employees are by virtue of their employment in honor bound to conscientious and loyal service, accepting without qualification and faithfully executing the policy and program of the Government of the day, irrespective of their private views concerning its wisdom.

These views accord with the body of informed opinion upon the subject.[38]

The regulatory functions of modern governments,[39] impinging as they do upon the interests of economic and social groups at many points, make it even more important that both fairness and public confidence in the fairness of administration be maintained.[40] Primarily the problem in this connection relates to fairness (as well as to competence) with respect to economic and social issues, often of a technical nature,[41] rather than with respect to matters which in the first instance involve party politics. The connection between party politics and economic interests which seek to attain their ends through party channels as well as otherwise is well known, however;[42] and the legitimacy of pro-

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[38] See: Field, *Civil Service Law* (1939); Dawson, *The Principle of Civil Service Independence* (1922); Wei Kung Chen, *The Doctrine of Civil Service Neutrality in Party Conflicts in the United States and Great Britain* (1937); *White, Government Career Service* (1935); Meriam, *Public Personnel Problems* (Brookings Institution, 1938), pp. 285-286.

[39] The growth and importance of these functions are too familiar a matter, especially to lawyers, to require review here. See, generally, *Final Report of the Attorney General's Committee on Administrative Procedure* (1941); C. F. Bevis, *Administrative Commissions and the Administration of Justice* (1928, 2 Univ. of Cin. L. Rev. 1, 4 *Selected Essays on Constitutional Law* 92.

[40] J. Donald Kingsley, *Representative Bureaucracy* (1944), pp. 221, 280-281.

[41] Cf. Frankfurter, *The Young Men Go to Washington*, in *Law and Politics* (1939) pp. 238-249; Corwin, *The President's Removal Power under the Constitution* (1927), 4 *Selected Essays on Constitutional Law* 1467, 1470-1471.

[42] Cf. Edward M. Sait, *American Parties and Elections* (3d ed., 1942), pp. 642-653.

tecting regulatory agencies from political as well as other pressures has been recognized by this Court [43] and by commentators. [44]

The Congress which is empowered to provide legislatively for specific protections to the impartial performance of their functions by administrative officers is not disabled by Constitutional provisions from imposing restraints upon the conduct of the officers themselves which are generally deemed to be conducive to the same over-all purpose. There must, it is true, be a reasonable relationship between means and ends; but creation of the basic conditions of good administration in terms of official behavior as well as in terms of tenure and conditions of employment is no less legitimate than striking at the direct imposition of pressures from outside or from above. The provision of the Hatch Act which is here challenged has, we believe, been validly devised for a proper purpose.

Nor does the exercise of legislative control over the partisan political activity of officers and employees impose upon them a condition of weak neutrality as to public questions in either their personal or their official capacities. They may entertain and publicly and privately express vigorous personal views upon significant issues; and in their official relations their work and their advice may benefit from strong convictions frankly stated.[45] A single

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[43] *Humphrey's Executor* v. *United States*, 295 U. S. 602, 624-625. The modern history of restrictions upon the President's removal power is set forth in the dissenting opinion of Mr. Justice Brandeis in *Myers* v. *United States*, 272 U. S. 52, at 252-264, 276-283. The present provision limiting the removal power as to employees in the classified civil service is contained in § 6 of the Act of August 24, 1912, 37 Stat. 555, 5 U. S. C. 652.

[44] Eastman, *The Place of the Independent Commission* (1928), 12 Const. Rev. 95; Henderson, *The Federal Trade Commission* (1924), p. 341; Robinson, *The Hoch-Smith Resolution and the Future of the Interstate Commerce Commission* (1929), 42 Harv. L. Rev. 610.

[45] See J. Donald Kingsley, *Representative Bureaucracy* (1914) pp. 274-278. It is significant that the author of this study of the British civil service

channel of expression and activity—namely political management and partisan participation in election campaigns otherwise than in a rank-and-file capacity—is alone denied to them for reasons of public policy. The deprivation may be substantial for some individuals; but at most it imposes upon them a choice between, on the one hand, public employment with this restriction and, on the other hand, alternative methods of earning a livelihood.

The legal restriction here in question is not more severe than the conventional restraint which attaches to numerous public and private employments.[46] The fact that it is embodied in a statute need occasion no surprise and gives rise to no problem; for the conditions of public employment are normally specified by law instead of by contract. As to government service, therefore, statutory provisions may fix terms which legislation could hardly impose upon private employees.[47] That there are constitutional limits to such restrictions may be conceded; but the power of the Government as employer has broader scope than its regulatory authority.

Acceptance of the widely-held view that political parties are essential to democratic government does not, of course, lead to the corollary that the legislature should be deprived of power to forbid the participation of the bulk of public

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as a responsible participant in policy, who in the cited passage recognizes limitations upon the doctrine of the impartiality of officials, approves of restrictions upon the political activity of civil servants and points out the difficulty of classifying public employees in this connection. Pp. 220-222.

[46] The preacher, the teacher, and the corporate executive can only rarely become active political partisans while retaining their posts. One of the severest codes of abstention from party politics currently in effect is, of course, that which members of the Federal judiciary observe.

[47] The crucial wage item in the employment relation serves as a sufficient illustration. Although under ordinary circumstances it doubtless must be left to the bargaining process as between private employers and employees, subject to legislatively prescribed standards, *United States* v. *Darby*, 312 U. S. 100, 125; *O'Gorman & Young* v. *Hartford Fire Ins. Co.*, 282 U. S. 251, 257, it is of course fixed by statute for numerous government employees.

employees in the active phases of party work. Even if it be true that groups of individuals either seeking or holding office have formed the permanent core of each of the parties in this country during the past century, it does not follow that this core need embrace more than a small portion of the offices or even that no other fundamental basis of party organization is possible. The opinion of most thoughtful students of the subject is to the contrary. The matter is in any event one which lies wholly within the legislative province;[48] for the regulation of the party system, like that of the public service, presents problems which can only be solved in the light of current conditions and needs. Adaptation of democratic traditions to new circumstances is a central requirement. In carrying forward the developing tradition of an impartial civil service, Congress has recognized a fundamental governmental trend and has not failed to take account of the needs of our political system.

C. THE PROVISION IS NOT REPUGNANT TO THE FIRST AMENDMENT

Appellants' contention that the second sentence of Section 9(a) of the Hatch Act constitutes an unconstitutional invasion of the freedoms guaranteed by the First Amendment (Br. 12-19) tends to ignore the section's third sentence. That sentence specifically permits all persons covered by the section to express their opinions, publicly as well as privately,[49] on all political subjects and candidates. They

[48] Organized parties did not, of course, exist in this country at the time the Constitution was adopted or for some time after, and Washington warned against the "spirit of party" in his farewell address. They are not in themselves, therefore, objects of constitutional protection. As to the development and nature of American parties see generally Merriam and Gosnell, *The American Party System* (Rev. ed., 1937) and the literature which is copiously cited therein. The probable effect of "the decline of patronage as a prime factor in the party" is discussed at pp. 457-461.

[49] 40 Op. Atty. Gen. No. 2; see also Sen. Doc. 105, 76th Cong., 1st Sess., supra, n. 10, pp. 2-4.

may do so singly or in concert, at all times and places except in circumstances which cause their activity to assume the character of taking an "active part in political management or in political campaigns", and still retain their employment.[50]

The question under the First Amendment is whether this is a reasonable provision and therefore within the discretion of Congress—whether, in the absence of restriction, the political activities proscribed by the second sentence would, in the words of Mr. Justice Holmes, "create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent," *Schenck* v. *United States*, 249 U. S. 47, 52 or diminish the soundness of

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[50] Moreover, certain spheres of political activity, such as nonpartisan elections and constitutional and other referenda, are specifically left open to Federal employees.

The Hatch Act authorizes Federal employees to engage "in any political activity (1) in connection with any election and the preceding campaign if none of the candidates is to be nominated or elected at such election as representing a party any of whose candidates for presidential elector received votes in the last preceding election at which presidential electors were selected; or (2) in connection with any question which is not specifically identified with any National or State political party. For the purposes of this section, questions relating to constitutional amendments, referendums, approval of municipal ordinances, and others of a similar character, shall not be deemed to be specifically identified with any National or State political party." § 18, 18 U. S. C. 61r.

The Hatch Act further provides that "Whenever the United States Civil Service Commission determines that, by reason of special or unusual circumstances which exist in any municipality or other political subdivision, in the immediate vicinity of the National Capital in the States of Maryland and Virginia or in municipalities the majority of whose voters are employed by the Government of the United States, it is in the domestic interest of persons to whom the provisions of this Act are applicable, and who reside in such municipality or political subdivision, to permit such persons to take an active part in political management or in political campaigns involving such municipality or political subdivision, the Commission is authorized to promulgate regulations permitting such persons to take an active part in such political management and political campaigns to the extent the Commission deems to be in the domestic interest of such persons." § 16, 18 U. S. C. 61p. See R. 53-56.

The prohibited political activities are spelled out in the Civil Service Commission's pamphlet, Form 1236 (Jan., 1944), at pp. 47-53 of the record.

the public service. "It is a question," Mr. Justice Holmes continued, "of proximity and degree."

There can be no question that "Congress has a right to prevent" the "substantive evils" of a spoils system and of "pernicious political activities" in the Federal service. We submit that, as shown above, there is sufficient "proximity" between these evils and the prohibited political activity by Government employees to support the congressional finding that the maintenance of a sound and disinterested civil service demands the elimination of such political activities by employees. See *Ex parte Curtis*, 106 U. S. 371.

The First Amendment does not guarantee that all persons may at all times and in all places speak or write as they may please; in the words of this Court, the "right of free speech is not absolute at all times and under all circumstances." *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571.[51] Moreover, the circumstances in which the particular conduct is forbidden materially affect the reasonableness and validity of the restriction. Words which in some circumstances would be constitutionally protected, may be prohibited by the Congress in other circumstances. Cf. *Aikens* v. *Wisconsin*, 195 U. S. 194, 205, 206; *Schenck* v. *United States*, 249 U. S. 47, 52.

Here the restrictions are limited to Federal employees, because the "circumstances" under which the proscribed conduct would be carried out—i. e., by those serving the public through the United States Government—were deemed by Congress to render conduct undesirable which

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[51] See also *Schenck* v. *United States*, 249 U. S. 47; *Whitney* v. *California*, 274 U. S. 357, 373 (Brandeis, J., concurring); *Stromberg* v. *California*, 283 U. S. 359; *Near* v. *Minnesota*, 283 U. S. 697; *De Jonge* v. *Oregon*, 299 U. S. 353; *Herndon* v. *Lowry*, 301 U. S. 242; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Labor Board* v. *Virginia Power Co.*, 314 U. S. 469, 477; *Gilbert* v. *Minnesota*, 254 U. S. 325, 332.

under other conditions (as by persons not within the Federal service) would be unobjectionable. The provision is distinguishable only in degree from those which prohibit the solicitation of political contributions by government employees from other government employees (Crim. Code § 118, *infra*, p. 55), or the solicitation of political contributions in government offices (Crim. Code § 119, *infra*, p. 55), or which provide for the prompt discharge of a government employee "who shall request, give to, or receive from, any other" government employee anything of value for political purposes (Section 6 of the Act of August 15, 1876, *infra*, p. 56). To the extent indicated, all these statutes place limitations upon the words and writings of those whose solicitations are thereby interdicted; nevertheless, their validity may not successfully be attacked. *United States* v. *Wurzbach*, 280 U. S. 396; *United States* v. *Thayer*, 209 U. S. 39; *Ex parte Curtis*, 106 U. S. 371; *United States* v. *Newton*, 9 Mackey 226 (D. C.).

Indeed, the provision here under attack is less drastic in the sanction it invokes than Sections 118 and 119 of the Criminal Code, for the prohibition against active political management and campaigning is enforceable only by dismissal from the service, not by fine and imprisonment. The second sentence of Section 9(a) is like other statutes which impose certain "legal consequences" other than punishment upon "verbal actions." Cf. *National Labor Relations Board* v. *M. E. Blatt Co.*, 143 F. 2d 268, 274 (C. C. A. 3), certiorari denied, 323 U. S. 774; *Gitlow* v. *Kiely*, 44 F. 2d 227, 228 (S. D. N. Y.), affirmed *per curiam*, 49 F. 2d 1077 (C. C. A. 2), certiorari denied, 284 U. S. 648; *National Labor Relations Board* v. *New Era Die Co.*, 118 F. 2d 500, 505 (C. C. A. 3); *Edward G. Budd Mfg. Co.* v. *National Labor Relations Board*, 142 F. 2d 922 (C. C. A. 3). Stated in terms specifically directed to the instant case, the individual appellants may "have a constitutional right

to talk politics," but they have no constitutional right to be government employees while engaging in politics in the prohibited manner. *McAuliffe* v. *New Bedford*, 155 Mass. 216, 220; *People* v. *Crane*, 214 N. Y. 154, 177, 178, affirmed, 239 U. S. 195; *Stowe* v. *Ryan*, 135 Ore. 371; *Commonwealth ex rel. Rotan* v. *Hasskarl*, 21 Pa. Dist. R. 119. See also, *Duffy* v. *Cooke*, 239 Pa. 427. Cf. *Gitlow* v. *Kiely*, 44 F. 2d 227, 229-230 (S. D. N. Y.), affirmed *per curiam*, 49 F. 2d 1077 (C. C. A. 2), certiorari denied, 284 U. S. 648.

To hold the restriction which is here involved violative of the First Amendment would require the substitution of judicial judgment for that of the Congress as to the extent of the harm to the public service which may arise out of the political activities of Federal employees and as to the wisdom of the particular measure enacted to avert this damage. This Court has consistently declined to make such a substitution in other situations. *Polish Alliance* v. *Labor Board*, 322 U. S. 643; *Hirabayashi* v. *United States*, 320 U. S. 81; *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381; *United States* v. *San Francisco*, 310 U. S. 16, 26. See also *United States* v. *Newton*, 9 Mackey 226, 231 (D. C.). The same reasoning is applicable here notwithstanding the claimed application of the First Amendment; for central to this case is the authority of Congress over the public service, which has here been applied without resort to other powers or to the bestowal of unlimited administrative discretion such as contributed to the invalidity of the regulations in *Lovell* v. *Griffin*, 303 U. S. 444; *Hague* v. *C. I. O.*, 307 U. S. 496; *Schneider* v. *State*, 308 U. S. 147; and *Cantwell* v. *Connecticut*, 310 U. S. 296.

Nor is it valid to contend as appellants so largely do in their brief, that Congress has gone beyond its power in striking at the root of much of the problem with which this and related legislation deals, instead of confining itself

to the prohibition of specific pernicious practices. This Court has long recognized that Congress may elect to deal with the sources of evils which are properly of concern to it, even to the extent of controlling activity or conditions which otherwise would be beyond its power to reach. *Wickard* v. *Filburn*, 317 U. S. 111, 128-129. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 36-43; *United States* v. *Darby*, 312 U. S. 100, 121-123.

Equally well recognized is the power of Congress to embark upon comprehensive programs of development, touching wide ranges of activity otherwise beyond congressional scope, in furtherance of objects which lie within its authority. *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508. The relation of the prevention of political activity on the part of government employees to the more positive need for an impartial civil service is evident. (See *supra*, pp. 26-32.)

It is also clear that political activity by officers and employees has produced and might again produce politically motivated discharges of personnel as well as discrimination in promotions and other bestowals of favor by official superiors. Less evident but nonetheless real are the subtle and elusive forms of pressure upon employees to induce active political participation which are possible if such participation is lawful. In the words of one writer, "The line between contributions or service rendered as the result of coercion and that which is really voluntary may be and often is impossible to draw. No word of threat or promise may be spoken by the superior officer, yet the employee may know perfectly well that a contribution or activity on his part will earn its due reward and conversely that failure to contribute, or inactivity, will bring swift and sure retribution." Mayers, *The Federal Service*, 160-161. See *Ex parte Curtis*, 106 U. S. 371; *I. A. of M.* v. *Labor Board*, 311 U. S. 72, 78; *National Labor*

Relations Board v. *Griswold Mfg. Co.*, 106 F. 2d 713, 722 (C. C. A. 3).[52]

We submit that, in the light of these considerations, Congress was empowered to proceed to fundamentals in legislating against a "politicalized civil service" by providing, as it did in Section 9(a) of the Hatch Act, that active participation in politics by an officer or employee should lead to his removal from the service.

D. THE PROVISION IS NOT REPUGNANT TO THE FIFTH AMENDMENT

The same considerations which sustain the second sentence of Section 9(a) as against the charge that it infringes the First Amendment, also negative most of the grounds of the contention that it is repugnant to the Fifth Amendment. In making this contention appellants allege that the section unduly restricts appellants' activities, discriminates against Federal employees and among classes of such employees, and is vague and indefinite (R. 8, 129, 134-135). We believe that none of these contentions is valid.

A statutory provision, merely because it restricts the activities of one segment of the population while permitting them to the remainder, does not constitute an unconstitutional deprivation of liberty or otherwise run afoul

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[52] The susceptibility of an employee to the wishes of his employer or supervisor is a matter of common knowledge, frequently recognized by the courts. "* * * the position of the employer is a most delicate one. * * * the voice of authority may, by tone inflection, as well as by the substance of the words uttered, provoke fear and awe quite as readily as it may bespeak fatherly advice. The position of the employer * * * carries such weight and influence that his words may be coercive when they would not be so if the relation of master and servant did not exist." *National Labor Relations Board* v. *Falk Corporation*, 102 F. 2d 383, 389 (C. C. A. 7). Nor need the employer's wishes be expressed. "The influence of [an official superior in government service] is not less effective if silently exerted." *People* v. *Connolly*, 152 N. Y. Supp. 495, appeal dismissed, 216 N. Y. 706.

of the Fifth Amendment so long as a basis for the distinction exists. See *Keokee Coke Co.* v. *Taylor*, 234 U. S. 224. Here the obvious bases for the distinction are the objective of the statute to provide a sound public service and the fact that the Government as an employer can and frequently must impose restrictions and regulations regarding its employees which are not applicable to the public at large. *Ex parte Curtis*, 106 U. S. 371; *Atkin* v. *Kansas*, 191 U. S. 207; *Ellis* v. *United States*, 206 U. S. 246; *Heim* v. *McCall*, 239 U. S. 175; *United States* v. *Wurzbach*, 280 U. S. 396; *People* v. *Crane*, 214 N. Y. 154, affirmed 239 U. S. 195; *Lee* v. *Lynn*, 223 Mass. 109, 112; *Opinion of the Justices*, 303 Mass. 631, 641. So long as such restrictions and regulations are not arbitrary and bear a reasonable relation to legitimate ends to be attained—here the development of a sound and impartial civil service—no question as to their constitutionality can arise. The validity of similar restrictions upon the activities of government employees has in fact long been recognized. *Ex parte Curtis*, 106 U. S. 371, 372-373; *United States* v. *Thayer*, 209 U. S. 39; *United States* v. *Wurzbach*, 280 U. S. 396; *United States* v. *Newton*, 9 Mackey 226 (D. C.); *McAuliffe* v. *New Bedford*, 155 Mass. 216; *People ex rel. Clifford* v. *Scannell*, 74 App. Div. 406; *Stowe* v. *Ryan*, 135 Ore. 371; *Commonwealth ex rel. Rotan* v. *Hasskarl*, 21 Pa. Dist. R. 119. See, also, *Duffy* v. *Cooke*, 239 Pa. 427.

Moreover, persons standing in an employment relation to the United States have no valid ground to object to separate treatment related to such employment (cf. *Rapid Transit Corp.* v. *New York*, 303 U. S. 573, 579), particularly where they undertook their employment after the regulations of which they complain were promulgated. Here, all the individual appellants began their employment with the United States and became classified employees after the 1907 amendment to Civil Service Rule I,

supra, p. 23 (R. 2-3, 14, 16, 19, 22-23, 26), and six of them after the passage of the Hatch Act (R. 11-12, 17-18, 20, 25, 28).

Similarly without substance is the suggestion in appellants' brief (p. 22) that Section 9 (a) may be invalid as to unclassified employees because they do not enjoy the same protections to tenure as classified employees. The section applies alike to both classes, eliminating the discrimination in the rules governing political activity which existed prior to its passage when active political management and campaigning were forbidden to classified employees by Civil Service Rule I but not to the unclassified (see *supra*, p. 23). The protections against political assessments and discrimination on political grounds, accorded to government employees by Sections 120 and 121 of the Criminal Code (see *supra*, p. 25) extend, however, to all employees whether classified or not. If a *quid pro quo* going beyond the advantages of current status as a government employee were needed for the restrictions imposed by an otherwise valid regulation, those sections would supply it. We think it is evident, however, that the validity of statutory safeguards to the public service cannot be made to turn upon any such considerations. The constitutionality of Section 9 (a) does not depend upon the degree of the safeguards surrounding the tenure of those who come under it. If it is valid as to classified employees, it is valid as to the unclassified.[53]

Appellants' point (Br. 35-39) that the inclusion of mechanical, clerical, and custodial employees in the prohibition of the second sentence of Section 9 (a) renders the provision

[53] The current importance of the exclusion of groups of Federal employees from the classified civil service is much less than it was at the time the Hatch Act was adopted. The Act of November 26, 1940, 54 Stat. 1211, 5 U. S. C. 631a, authorized the inclusion in the classified service of the great bulk of Federal employees previously excluded by statute. They were subsequently "covered in" pursuant to Executive Order 8743 of April 23, 1941, 3 C. F. R., Cum. Supp. (1943), p. 927.

unreasonable, breaks down upon analysis. It is true that the performance of the work of these employees does not, by reason of the nature of the work, require political neutrality on their part. Participation in political management or campaigns may not, however, be consistent with diligence in the performance of the work—a factor which did not go unnoticed in the congressional debates.[54] As to the evils of political "spoils" and discrimination in relation to employees, moreover, the lowlier positions are, if anything, more important than the higher ones;[55] for as to the latter the demands of the positions, as well as interest by professional groups in their staffing and in the work, are likely in any event to retard improper practices; whereas the incumbents of routine positions may carry on in a different atmosphere. The routine positions, moreover, are much more numerous and would supply more political workers if the attempt were made to secure political participation by employees. Furthermore, it would be difficult to draw the line between those positions which require political impartiality on the part of the incumbents and those which do not.[56] It therefore cannot be said that a broad prohibition, applicable to all employees, is unreasonable.

There are excepted from the operation of the second sentence of Section 9 (a) only certain enumerated policy-making officials, certain part-time employees serving without compensation or with merely nominal compensation in connection with the war effort, and employees of certain educational and research institutions. § 21, 18 U. S. C. 61u. Such a classification is properly within the province

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[54] See the remarks of Congressman T. V. Smith, 86 Cong. Rec. 9451, with reference to the improvement which the Hatch Act of 1939 accomplished in this regard.

[55] "The thing • • • [the political boss] sets the greatest store by are the smaller places, the labouring jobs." Frank R. Kent, *The Great Game of Politics* (2d ed., 1930), p. 99. See also the remarks of Senator Hatch at 86 Cong. Rec. 2433.

[56] See *supra*, n. 45.

of Congress. The Fifth Amendment, which, unlike the Fourteenth, contains no equal protection clause, restrains only such discriminatory legislation as, due to its arbitrary or injurious character, amounts to a denial of due process. *Hirabayashi* v. *United States*, 320 U. S. 81, 100; *Detroit Bank* v. *United States*, 317 U. S. 329, 337-338; *Second Employers' Liability Cases*, 223 U. S. 1, 52-53.[57] The distinctions between employees which Congress has recognized in the Hatch Act have a clearly demonstrable basis.

The reason for Congress' exemption of certain enumerated officials[58] from the operation of the second sentence of Section 9 (a) is clear. They are policy makers who have historically always been identified politically with the controlling administration. Such an identification, besides its long historical acceptance, has been justified by experts in the field. "The convention of neutrality cannot, in the nature of things, be applied to policy-determining officers." Mosher and Kingsley, *Public Personnel Administration*, 385.[59] Such officers may and frequently do change as the administration changes its political complexion; it would be impractical and unreal to expect such officials to maintain a neutral or non-partisan attitude. Indeed, the very nature of the government requires, not that these policy makers remain

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[57] See also *LaBelle Iron Works* v. *United States*, 256 U. S. 377, 392; *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 584-585; *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 401; *Helvering* v. *Lerner Stores Co.*, 314 U. S. 463, 468.

[58] "(1) the President and Vice President of the United States; (2) persons whose compensation is paid from the appropriation for the office of the President; (3) heads and assistant heads of executive departments; (4) officers who are appointed by the President, by and with the advice and consent of the Senate, and who determine policies to be pursued by the United States in its relations with foreign powers or in the Nation-wide administration of Federal Laws." 18 U. S. C. 61h(a).

[59] See, also, Report of the President's Committee on Civil Service Improvement, House Doc. 118, 77th Cong., 1st Sess., p. 22: "Government officials and employees, except those occupying positions the duties of which are to determine policy, should be free from partisan obligations . . ."

impartial, but, on the contrary, that they reflect the wishes of the electorate expressed at the polls. See 84 Cong. Rec. 4303, 9601, 9630, 9672; 86 Cong. Rec. 2432. The distinction made in Section 9 (a) thus has a sound and reasonable basis.

The exemption from the operation of the second sentence of Section 9 (a) of part-time officers and part-time employees "without compensation or with nominal compensation serving in connection with the existing war effort" (18 U. S. C. 61h(a))[60] is a temporary provision of the Hatch Act, inserted in 1942 and expiring on December 31, 1945.[61] The basis for this exemption is stated as follows by the Senate Committee on the Judiciary in its Report (No. 989, 77th Cong., 2d Sess., pp. 6-7):

> The Federal Government has need of the services of the many prominent and patriotic citizens who are glad to render their assistance without compensation or upon payment of a nominal sum in lieu of compensation. Outstanding examples of such citizens are the members of the local and appeal boards of the Selective Service System throughout the Nation, the members of the tire-rationing boards, special assistants to the Attorney General designated by the Department of Justice as hearing officers for conscientious-objector cases, and members of the enemy alien hearing boards created and established after the declaration of war.
>
> The mutual desire of the Government and its patriotic citizens, who are often active in political life, that their services be accepted in this emergency should not be hampered by the restrictions in existing law which would require such citizens, as a condition of

[60] It should be noted that from this exempted class are excepted those officers and employees serving "in any capacity relating to the procurement or manufacture of war material." 18 U. S. C. 61h (a).

[61] Or at "such earlier time as the two Houses of Congress by concurrent resolution, or the President, may designate." The exemption was added to the Hatch Act by Title VII of the Second War Powers Act, 1942, 56 Stat. 181, and expires with Title VII of that Act.

the performance of valuable and voluntary services, to abstain from participation in the political life of their communities.

It was clearly reasonable for Congress to distinguish between career or permanent government employees, who are expected to devote themselves to their government positions and whose livelihoods are derived from the Government, and those employees who, in the interest of the war effort, donate a part of their time to the Government, either gratuitously or for merely nominal compensation.

The exemption of employees of certain educational and research institutions [62] from the operation of the second sentence of Section 9 (a) has equally a reasonable basis. The exemption was introduced into the Act in 1942, after "the attorneys general of Ohio and Minnesota ruled that teachers in land-grant colleges and in schools being assisted under the Smith-Lever Act and Bankhead-Jones Act was subject to the [Hatch] act." [63] Report, House Committee on the Judiciary H. Rep. 2296, 77th Cong., 2d Sess.; 88 Cong. Rec. 7773. Obviously, the interest of the Federal Government in divorcing politics from its civil service and protecting its employees from political pressures does not extend to educational institutions which may incidentally receive financial aid, frequently small, from the Federal Government. See 88 Cong. Rec. 7772. Obviously, also, the conduct of the Government's business by Federal employees is a far different thing from the work of teachers whose

[62] "* * * any educational or research institution, establishment, agency, or system which is supported in whole or in part by any State or political subdivision thereof, or by the District of Columbia or by any Territory or Territorial possession of the United States; or by any recognized religious, philanthropic, or cultural organization." 18 U. S. C. 61u.

[63] Section 12(a) of the Hatch Act, 18 U. S. C. 61l(a), imposes the proscription of the second sentence of Section 9(a) upon officers and employees of State and local agencies "whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency."

function of disseminating information and provoking thought, political and otherwise, might be interfered with were the prohibitions of the second sentence of Section 9 (a) made applicable to them. See 88 Cong. Rec. 7772.

The complaint and the affidavits of appellants attached to their motion for interlocutory injunction fully answer their contention that the second sentence is vague and indefinite. In their pleadings and affidavits, the appellants set out a long list of activities which they allege are proscribed by Section 9(a) of the Act (R. 4, 6, 12, 15-29), apparently having had little difficulty in determining what is meant by taking an "active part in political management or in political campaigns."

A similar contention was rejected by this Court in *United States* v. *Wurzbach*, 280 U. S. 396, where the meaning of the phrase "political purpose" was held to be sufficiently definite for the purposes of Section 118 of the Criminal Code, 18 U. S. C. 208, making criminal the solicitation of contributions for a "political purpose" by government employees from government employees.[64] The phrases "political management" and "political campaigns" would seem to be at least sufficiently definite for inclusion in a non-criminal provision. Cf. *Fox* v. *Washington*, 236 U. S. 273.

Moreover, the activities prohibited by Section 9(a) are further particularized by Section 15 of the Hatch Act, 18 U. S. C. 61o, which provides that Section 9(a) "shall be deemed to prohibit the same activities . . . as the United States Civil Service Commission has heretofore determined are at the time this section takes effect[65] prohibited on the part of employees in the classified civil serv-

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[64] See Criminal Code § 122, 18 U. S. C. 212.

[65] July 19, 1940, 54 Stat. 767, c. 640, § 4.

ice of the United States by the provisions of the civil-service rules prohibiting such employees from taking any active part in political management or in political campaigns." By virtue of that provision, the definitions of political activities forbidden by the Civil Service Commission prior to July 19, 1940, are incorporated into the Hatch Act. The definitions of prohibited conduct were at that time and still are publicized by the Commission and brought to the attention of all Federal employees. See R. 32, 71-111, *passim*, particularly 75-76, 80-86; 86 Cong. Rec. 2341-2342, 2938-2940; see, also, R. 36-70, *passim*, particularly 47-53; R. 114A; Chapter C2 of the Civil Service Commission's *Federal Personnel Manual*, currently being published in looseleaf form.

E. THE PROVISION DOES NOT OFFEND AGAINST THE NINTH OR TENTH AMENDMENTS

Appellants' contention (R. 8, 129, 134) that the second sentence of Section 9(a) of the Hatch Act constitutes "a deprivation of the fundamental right of the people of the United States to engage in political activity, reserved to the people of the United States by the Ninth and Tenth Amendments"[66] is not pressed in their brief. Obviously the employment by the Federal Government of "means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end" (*United States* v. *Darby*, 312 U. S. 100, 124) does not invade the reserved powers. *Ex parte Curtis*, 106 U. S. 371, 372; *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 324, 325; *McCulloch* v. *Maryland*, 4 Wheat. 316, 405, 406; *Gordon* v. *United States*, 117

[66] Cf. Section 12(a) of the Act, 18 U. S. C. 61*l*(a), which imposes the prohibitions of the second sentence of Section 9(a) upon officers and employees of State and local agencies "whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency" and which has been upheld against attack as in violation of the Tenth Amendment. *Neustein* v. *Mitchell*, 52 F. Supp. 531 (S. D. N. Y.); *Stewart* v. *United States Civil Service Commission*, 45 F. Supp. 697 (N. D., Ga.).

U. S. 697, 705; *United States* v. *Butler*, 297 U. S. 1, 63; Const., Art. I, Sec. 8. There can be no doubt of the power of Congress to make appropriate provision for employees to carry on the Government's work (Const., Art. II, Sec. 2, Par. 2), and implicit in this power is the authority to make all laws necessary and proper for the governance of such employees. *Ex parte Curtis*, 106 U. S. 371.

The right of the citizen to take an active part in political management and political campaigns, moreover, does not imply that there is a constitutional right to hold a government position while engaging in these activities. Rather, when an individual accepts employment with the Government, he submits to such reasonable regulation of Federal employees as Congress sees fit to impose. See *Ex parte Curtis*, 106 U. S. 371; *People* v. *Crane*, 214 N. Y. 154, 177, 178, affirmed, 239 U. S. 195; *Stowe* v. *Ryan*, 135 Ore. 371; *People ex rel. Clifford* v. *Scannell*, 74 App. Div. 406; *Commonwealth ex rel. Rotan* v. *Hasskarl*, 21 Pa. Dist. R. 119; *Duffy* v. *Cooke*, 239 Pa. 427; *McAuliffe* v. *New Bedford*, 155 Mass. 216, 220; cf. *Egan* v. *United States*, 137 F. 2d 369, 374 (C. C. A. 8), certiorari denied, 320 U. S. 788.

CONCLUSION

Even were there doubt as to the constitutionality of the challenged provision of Section 9 (a) of the Hatch Act, "every possible presumption" would arise "in favor of the validity of the statute." *Mugler* v. *Kansas*, 123 U. S. 623, 661; *Graves* v. *Minnesota*, 272 U. S. 425, 428; *United States* v. *Curtis*, 12 Fed. 824, 840 (S. D. N. Y), affirmed, 106 U. S. 371; *United States* v. *Newton*, 9 Mackey 226 (D. C.); *Whitney* v. *California*, 274 U. S. 357; *Wampler* v. *Lecompte*, 282 U. S. 172; *Gitlow* v. *New York*, 268 U. S. 652; *Nebbia* v. *New York*, 291 U. S. 502. This is particularly true where, as here, the provision under attack has a genealogy of substance extending back to the very beginnings of the nation. See *McCulloch* v. *Maryland*, 4 Wheat. 316, 401; *United States*

v. *Midwest Oil Co.*, 236 U. S. 459, 472-474; *Inland Waterways Corp.* v. *Young*, 309 U. S. 517, 525; *City of Tulsa* v. *Southwestern Bell Telephone Co.*, 75 F. 2d 343, 351 (C. C. A. 10), certiorari denied, 295 U. S. 744; *De Soto Motor Corporation* v. *Stewart*, 62 F. 2d 914, 915-916 (C. C. A. 10).

In this case, not only is there a long tradition in the history of this country lying behind the prohibition which Congress has enacted, but there is involved an integral feature of the system of civil service which has been developed to meet the needs of modern government—a system which has been called "the one great political invention" of 19th century democracy. Graham Wallas, *Human Nature in Politics* (3d ed., 1921), p. 263. This political invention rests upon the conception that it is "upon serious and continued thought and not upon opinion that the power to carry out our purposes, whether in politics or elsewhere, must ultimately depend." *Id.*, p. 267. A deliberate legislative enactment, designed to aid in carrying such a conception into effect, merits every safeguard which the process of constitutional adjudication has evolved in behalf of challenged legislation. For this reason, and for those advanced in the previous portions of our brief, we respectfully submit that the court below should be directed to dismiss the appellants' complaint or, if it be determined that the court has jurisdiction, that the judgment below should be affirmed.

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John F. Sonnett,
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David L. Kreeger,
Special Assistant to the Attorney General.
Ralph F. Fuchs,
Abraham J. Harris.

November, 1945.

APPENDIX

I. CONSTITUTIONAL PROVISIONS INVOLVED

1. Article I, Section 8, of the Constitution provides, in part, as follows:

> The Congress shall have Power * * * To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

2. Article II, Section 2, of the Constitution provides, in part, as follows:

> The President * * * shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments. * * *

3. The First Amendment provides, in part, as follows:

> Congress shall make no law * * * abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

4. The Fifth Amendment provides, in part, as follows:

> * * * nor shall any person * * * be deprived of life, liberty, or property, without due process of law; * * *

5. The Ninth Amendment provides:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

6. The Tenth Amendment provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

II. STATUTES INVOLVED

1. The Hatch Act, 18 U. S. C. § 61-61x, provides in part as follows:

> § 9 (18 U. S. C. § 61h). (a) It shall be unlawful for any person employed in the executive branch of the Federal Government, or any agency or department thereof, to use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. No officer or employee in the executive branch of the Federal Government, or any agency or department thereof, except a part-time officer or part-time employee without compensation or with nominal compensation serving in connection with the existing war effort, other than in any capacity relating to the procurement or manufacture of war material shall take any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates. For the purposes of this section the term "officer" or "employee" shall not be construed to include (1) the President and Vice President of the United States; (2) persons whose compensation is paid from the appropriation for the office of the President; (3) heads and assistant heads of executive departments; (4) officers who are appointed by the President, by and with the advice and consent of the Senate,

and who determine policies to be pursued by the United States in its relations with foreign powers or in the Nation-wide administration of Federal Laws. (b) Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any Act of Congress for such position or office shall be used to pay the compensation of such person.

§ 12(a) (18 U. S. C. § 61*l*(a)). No officer or employee of any State or local agency whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency shall (1) use his official authority or influence for the purpose of interfering with an election or a nomination for office, or affecting the result thereof, or (2) directly or indirectly coerce, attempt to coerce, command, or advise any other such officer or employee to pay, lend, or contribute any part of his salary or compensation or anything else of value to any party, committee, organization, agency, or person for political purposes. No such officer or employee shall take any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates. For the purposes of the second sentence of this subsection, the term "officer or employee" shall not be construed to include (1) the Governor or the Lieutenant Governor of any State or any person who is authorized by law to act as Governor, or the mayor of any city; (2) duly elected heads of executive departments of any State or municipality who are not classified under a State or municipal merit or civil-service system; (3) officers holding elective offices.

§15 (18 U. S. C. § 61o). The provisions of this subchapter which prohibit persons to whom such provisions apply from taking any active part in political management or in political campaigns shall be deemed

to prohibit the same activities on the part of such persons as the United States Civil Service Commission has heretofore determined are at the time this section takes effect prohibited on the part of employees in the classified civil service of the United States by the provisions of the civil-service rules prohibiting such employees from taking any active part in political management or in political campaigns.

§ 16 (18 U. S. C. § 61p). Whenever the United States Civil Service Commission determines that by reason of special or unusual circumstances which exist in any municipality or other political subdivision, in the immediate vicinity of the National Capital in the States of Maryland and Virginia or in municipalities the majority of whose voters are employed by the Government of the United States, it is in the domestic interest of persons to whom the provisions of this subchapter are applicable, and who reside in such municipality or political subdivision, to permit such persons to take an active part in political management or in political campaigns involving such municipality or political subdivision, the Commission is authorized to promulgate regulations permitting such persons to take an active part in such political management and political campaigns to the extent the Commission deems to be in the domestic interest of such persons.

§ 18 (18 U. S. C. § 61r). Nothing in the second sentence of section 9(a) or in the second sentence of section 12(a) of this title shall be construed to prevent or prohibit any person subject to the provisions of this subchapter from engaging in any political activity (1) in connection with any election and the preceding campaign if none of the candidates is to be nominated or elected at such election as representing a party any of whose candidates for presidential elector received votes in the last preceding election at which presidential electors were selected, or (2) in connection with any question which is not specifically identified with any National or State political party.

For the puropses of this section, questions relating to constitutional amendments, referendums, approval of municipal ordinances, and others of a similar character, shall not be deemed to be specifically identified with any National or State political party.

§ 21 (18 U. S. C. § 61u). Nothing in sections 2, 9(a), or 9(b), or 12 of this title shall be deemed to prohibit or to make unlawful the doing of any act by any officer or employee of any educational or research institution, establishment, agency, or system which is supported in whole or in part by any State or political subdivision thereof, or by the District of Columbia or by any Territory or Territorial possession of the United States; or by any recognized religious, philanthropic, or cultural organization.

2. Sections 118 to 122 of the Criminal Code, 18 U. S. C. §§ 208-212, inclusive, provide:

18 U. S. C. § 208. It is unlawful for any Senator or Representative in, or Delegate or Resident Commissioner to, Congress, or any candidate for, or individual elected as, Senator, Representative, Delegate, or Resident Commissioner, or any officer or employee of the United States, or any person receiving any salary or compensation for services from money derived from the Treasury of the United States, to directly or indirectly solicit, receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political purpose whatever, from any other such officer, employee, or person.

18 U. S. C. § 209. No person shall, in any room or building occupied in the discharge of official duties by any officer or employee of the United States mentioned in section 208 of this title, or in any navy yard, fort, or arsenal, solicit in any manner whatever or receive any contribution of money or other thing of value for any political purpose whatever.

18 U. S. C. § 210. No officer or employee of the United States mentioned in section 208 of this title shall dis-

charge, or promote, or degrade, or [illegible] change the official rank or compensation [illegible] officer or employee, or promise or threaten [illegible] for giving or withholding or neglecting to make any contribution of money or other valuable thing for any political purpose.

18 U. S. C. § 211. No officer, clerk, or other person in the service of the United States shall, directly or indirectly, give or hand over to any other officer, clerk, or person in the service of the United States, or to any Senator or Member of or Delegate to Congress, or Resident Commissioner, any money or other valuable thing on account of or to be applied to the promotion of any political object whatever.

18 U. S. C. § 212. Whoever shall violate any provision of sections 208 to 211 of this title shall be fined not more than $5,000, or imprisoned not more than three years, or both.

3. Section 6 of the Act of August 15, 1876, 19 Stat. 169, 18 U. S. C. § 213, provides:

Any executive officer or employee of the United States not appointed by the President, with the advice and consent of the Senate, who shall request, give to, or receive from, any other officer or employee of the Government any money or property or other thing of value for political purposes shall be at once discharged from the service of the United States.

4. R. S. § 1753, 5 U. S. C. § 631, provides:

The President is authorized to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch of service into which he seeks to enter; and for this purpose he may employ suitable persons to conduct such inquiries, and may

...heir duties, and establish regulations for ...t of persons who may receive appointments ... ...vil service.

5. ...ion 2 of the Civil Service Act of 1883, 22 Stat. 403, 5 U. S. C. § 633, provides, in part, as follows:

> It shall be the duty of said [civil service] commissioners:
>
> First. To aid the President, as he may request, in preparing suitable rules for carrying this section * * * into effect, and when said rules shall have been promulgated it shall be the duty of all officers of the United States in the departments and offices to which any such rules may relate to aid, in all proper ways, in carrying said rules, and any modification thereof, into effect.
>
> Second. Among other things, said rules shall provide and declare, as nearly as the conditions of good administration will warrant, as follows: * * *
>
> Fifth. No person in the public service is for that reason under any obligations to contribute to any political fund, or to render any political service, and that he will not be removed or otherwise prejudiced for refusing to do so.
>
> Sixth. No person in said service has any right to use his official authority or influence to coerce the political action of any person or body. * * *

6. Section 3 of the Act of August 24, 1937, 28 U. S. C. § 380a, provides, in part, as follows:

> No interlocutory or permanent injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any Act of Congress upon the ground that such Act or any part thereof is repugnant to the Constitution of the United States shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge,

unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge. * * *. An appeal may be taken directly to the Supreme Court of the United States upon application therefor or notice thereof within thirty days after the entry of the order, decree, or judgment granting or denying, after notice and hearing, an interlocutory or permanent injunction in such case. In the event that an appeal is taken under this section, the record shall be made up and the case docketed in the Supreme Court of the United States within sixty days from the time such appeal is allowed, under such rules as may be prescribed by the proper courts. * * *

III. REGULATIONS INVOLVED

1. Civil Service Rule I provides, in part, as follows:

1. *No interference with elections.*—No person in the executive civil service shall use his official authority or influence for the purpose of interfering with an election or affecting the results thereof. Persons who by the provisions of these rules are in the competitive classified service, while retaining the right to vote as they please and to express their opinion on all political subjects, shall take no active part in political management or in political campaigns.

2. *No disclosure or discriminations.*—No question in any form of application or in any examination shall be so framed as to elicit information concerning the political or religious opinions or affiliations of any applicant, nor shall any inquiry be made concerning such opinions or affiliations, and all disclosures thereof shall be discountenanced, except as to such membership in political parties or organizations as constitutes by law a disqualification for Government employment. No discrimination shall be exercised, threatened, or promised by any person in the executive civil service against or

in favor of any applicant, eligible, or employee in the classified service because of race, or his political or religious opinions or affiliations, except as may be authorized or required by law.

3. *Prohibited Recommendations.*—No recommendation of an applicant, eligible, or employee in the classified service involving disclosure of his political or religious opinions or affiliations shall be considered or filed by the Civil Service Commission, hereinafter called the Commission, or by any officer concerned in making appointments or promotions.

2. Civil Service Rule XV provides:

Legal appointment necessary to compensation.—Whenever the Commission finds, after due notice and opportunity for explanation, that any person has been appointed to or is holding any position, whether by original appointment, promotion, assignment, transfer, or reinstatement, in violation of the Civil Service Act or Rules, or of any Executive order or any regulation of the Commission, or that any employee subject thereto has violated such Act, Rules, orders, or regulations, it shall certify the facts to the proper appointing officer with specific instructions as to discipline or dismissal of the person or employee affected. If the appointing officer fails to carry out the instructions of the Commission within 10 days after receipt thereof, the Commission shall certify the facts to the proper disbursing and auditing officers, and such officers shall make no payment or allowance of the salary or wages of any such person or employee thereafter accruing.

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